No. 13,088

United States Court of Appeals
For the Ninth Circuit

DONALD McKITTRICK and BARBARA McKITTRICK,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' OPENING BRIEF.

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This is an appeal taken pursuant to Rule 73 of the Federal Rules of Civil Procedure. The judgment was rendered and entered under Rule 54 on the 11th day of May, 1951 (Tr. 35-37). Defendants served a motion for a new trial under Rule 59 on the 21st day of May, 1951 (Tr. 37-38). On the 4th day of June, 1951, His Honor, Judge Carter, denied the motion (Tr. 39) and on the 9th day of July, 1951, defendants filed their notice of appeal (Tr. 40). The time for docketing the record on appeal was enlarged by order until the 17th day of September, 1951 (Tr. 42). The appeal was docketed on the 11th day of September, 1951 (Tr. 239).

Jurisdiction of the action is based on Sections 205 and 206 of the Housing and Rent Act of 1947, as amended (50 U.S.C.A. app. 1881-1906).

STATEMENT OF FACTS.

Barbara and Donald McKittrick, the defendants and appellants, owned two houses, one at 111 Oakmont Avenue, in Piedmont, and one in Walnut Creek (Tr. 140, 177). They lived in Walnut Creek and rented their home in Piedmont. When the home in Piedmont was first rented, the rental was $150 per month (Tr. 64-65). The area rent control reduced this to $110 per month (Pl. Ex. No. 1; Tr. 61) and they continued to rent it for that figure until about the beginning of July, 1946, when the tenant gave notice of departure (Tr. 180-181). The McKittricks then listed the house for rental at $110 per month (Tr. 180). From one of these listings, Bruce A. Wilson learned of the house, went to the tenant and found the name and address of the owner, and he and Mrs. Wilson went to discuss the matter with the McKittricks at Walnut Creek (Tr. 130-131).

At that time the McKittricks had been offered $180 per month rental for their Walnut Creek home and had decided to rent it and move into the Piedmont house (Tr. 143-145; 182-183; 204-205). The Walnut Creek house rental was not under control, and for this reason the McKittricks had decided to move into

the Piedmont house, thereby increasing their income by $70 per month.

Wilson admitted that the Piedmont house was worth more than $110 per month and he offered to pay $135 per month (Tr. 146; 183-184), called the McKittricks' attention to the fact that rent controls were then not in force in Piedmont (Tr. 185-186), and offered to pay $300 cash in advance as a bonus to induce the McKittricks to refrain for one year from occupying the Piedmont house themselves (Tr. 151). After considering the matter, the McKittricks decided to stay in Walnut Creek, thereby increasing their living costs by $45 per month over what they would have been had they moved into the Piedmont house.

The parties drew up a lease. As first drawn it was a one-year lease at $135 per month, but was altered to a one-year lease at $110 per month (Tr. 149-151). In this form it was signed (Tr. 27-30). It contained a provision that if the tenant held over, the tenancy was from month to month on the same terms (Tr. 29).

At the end of the year the Wilsons stayed on. They voluntarily paid rent at $135 per month for two or three months (Tr. 152). Then they met and both parties signed an extension under the same terms for another year (Tr. 152; Pl. Ex. No. 3; Tr. 94). Wilson continued to pay $135 per month, not only for that year, but for the balance of the time he was in possession (Tr. 152-155; 186-187). Wilson never protested, and the McKittricks never asked for anything but

the $110 per month rent specified in the lease and allowable under federal rent regulations (Tr. 152-155; 186-187).

As soon as the Wilsons moved out, the McKittricks applied to the Area Rent Control Office for an increase in the rental ceiling. This was promptly done to increase it to $130 per month (Tr. 77-78). No application was made while the Wilsons were there.

ASSIGNMENT OF ERRORS.

The Court made no findings of fact on the issue of restitution. The Court concluded:

> "That the Defendants have failed to satisfactorily show why the equitable power of this Court should not be exercised, or to satisfactorily assume the burden of proving that the acceptance of the overcharges within the year immediately preceding the filing of the complaint herein was not wilful nor the result of failure to take practicable precautions against such occurrence." (Conclusions of Law, No. 5; Tr. 33.)

Otherwise the findings are simply routine. They find no facts as to what may have been the equities concerning restitution.

The Order for Judgment states:

> "* * * and the defendants have failed to satisfactorily show why the equitable powers of this Court should not be exercised, or to satisfactorily assume the burden of proving that the acceptance

of the overcharges within the year immediately preceding the filing of this complaint was not wilful.''

That the Court failed to find as to the equities concerning restitution, and that the Court shifted the burden upon the defendants to show that restitution should not be made, instead of placing upon plaintiff the burden of proving that restitution should be made, was fully called to the attention of His Honor, Judge Carter, and he declined either to grant a new trial or to correct his findings (Tr. 39).

It is admitted that the McKittricks received $300 when the lease was signed, and it is admitted that each month after the first year Wilson paid and the McKittricks received $25 more than the ceiling rental. We have set forth the facts most favorable to the defendants because the trial judge has not told us:

1. Whether Wilson or McKittrick induced the overpayments;

2. Whether McKittrick made any threats of eviction or otherwise if the extra money was not paid;

3. Whether the premises were reasonably worth more than $110 per month during any of the period involved, as the Area Rent Control found they were immediately afterwards;

4. Whether the McKittricks actually sustained a loss of $1800 on rentals while the Wilsons were there;

5. Whether the McKittricks will sustain a loss of $2800 on rentals if restitution must be made.

We merely point out to the Court that there is evidence in the record from which the Court could have found, consistent with all of the other findings, that Wilson induced McKittrick to enter into the tenancy and voluntarily paid $25 per month more than the ceiling rental in order to induce the McKittricks not to take possession of their own home, which they had the legal right to do, and that the McKittricks have actually lost $1800 on the Wilsons so far and if restitution is granted will lose $2800, while the Wilsons occupied premises worth, at the last part of the term, $130 per month, for which they will only have to pay $110 per month. And the Court denied permission to prove that the reasonable rental value was more than the ceiling rental value.

The first error complained of is the trial Court's finding that it was incumbent upon defendants to prove that they should not restore money which was paid to them in the face of a contract which would have been an absolute legal bar in an action at law to any recovery of the sum so paid, instead of requiring plaintiff to prove that the equities demanded that money paid by a mere volunteer (from the legal standpoint) should be restored to him.

The second error of which appellants complain is the portion of the judgment ordering defendants to pay, in effect, a total of four times the alleged overcharges collected over a three months period; it is

appellants' contention that the maximum total refund which can be ordered paid by defendants—either by way of damages or by way of restitution—cannot in the aggregate exceed three times the total overcharge collected by the landlord in any given period.

THE BURDEN OF PROOF WAS ON THE UNITED STATES.

This is not an action brought to recover the money paid in excess of the lawful ceiling rental. Such an action would be brought pursuant to the provisions of the damage section of the Housing and Rent Act. That statute provides:

> "*Recovery of damages.*—Any person who demands, accepts, or receives any payment of rent in excess of the maximum rent prescribed under section 204 shall be liable to the person from whom he demands, accepts, or receives such payment (or shall be liable to the United States as hereinafter provided), for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amount of (1) $50, or (2) three times the amount by which the payment or payments demanded, accepted, or received exceed the maximum rent which could lawfully be demanded, accepted, or received, whichever in either case may be the greater amount: Provided, That the amount of such liquidated damages shall be the amount of the overcharge or overcharges if the defendant proves that the violation was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation. Suit to recover such amount may be brought

in any Federal, State, or Territorial court of competent jurisdiction within one year after the date of such violation: Provided, That if the person from whom such payment is demanded, accepted, or received either fails to institute an action under this section within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the United States may institute such action within such one-year period. If such action is instituted, the person from whom such payment is demanded, accepted, or received shall thereafter be barred from bringing an action for the same violation or violations. For the purpose of determining the amount of liquidated damages to be awarded to the plaintiff in an action brought under this section, all violations alleged in such action which were committed by the defendant with respect to the plaintiff prior to the bringing of action shall be deemed to constitute one violation, and the amount demanded, accepted, or received in connection with such one violation shall be deemed to be the aggregate amount demanded, accepted or received in connection with all violations. A judgment in an action under this section shall be a bar to a recovery under this section on any other action against the same defendant on account of any violation with respect to the same person prior to the institution of the action in which such judgment was rendered." (June 30, 1947, c. 163, Title II, § 205, 61 Stat. 199; Mar. 30, 1949, c. 42, Title II, § 204, 63 Stat. 27.)

This action was commenced on the 3rd of August, 1950. Only $405 was paid in rent after August 3,

1949, and this sum so paid exceeded the ceiling rental by only $75 (Plaintiff's Exhibit A; Tr. 9).

By this action the Government seeks to recover in all $1000 paid in excess of the ceiling rental, of which $925 was paid before August 3, 1949. Any action for the recovery of this sum is barred.

The Government, however, places their right of recovery on the broad principles of restitution authorized by the prohibition and enforcement section of the Housing and Rent Act. The United States Supreme Court has held that this section authorized an equitable action for restitution, even after any recovery in an "action of law" is barred by the statute (*Porter v. Warner Holding Co.* (1945), 328 U.S. 395).

In that decision the Supreme Court points out two things:

1. The fact that the statute has barred a legal action does not prevent restitution.

> "* * * An order for the recovery and restitution of illegal rents may be considered a proper 'other order' on either of two theories:
>
> "(1) It may be considered as an equitable adjunct to an injunction decree.
>
> * * * * * * *
>
> "(2) It may be considered as an order appropriate and necessary to enforce compliance with the Act."
>
> *Porter v. Warner Holding Co.* (1945), 328 U.S. 395, 399.

2. The recovery is based upon the equitable principles of restitution and depends upon the peculiar facts of each case.

> "Restitution, which lies within that equitable jurisdiction, is consistent with and differs greatly from the damages and penalties which may be awarded under § 205 (e). Bowles v. Skaggs, supra ((CCA 6th) 151 F. 2d 821). When the Administrator seeks restitution under § 205(a) he does not request the court to award statutory damages to the purchaser or tenant or to pay to such person part of the penalties which go to the United States Treasury in a suit by the Administrator under § 205(e). Rather he asks the court to act in the public interest by restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant. Such action is within the recognized power and within the highest tradition of a court of equity."
>
> *Porter v. Warner Holding Co.* (1945), 328 U.S. 395, 402.

Porter v. Warner Holding Company does not hold that there is an absolute right in the United States to a decree of restitution in every case in which there has been a rental overcharge above the legal ceiling. It merely reversed the lower Court in refusing to take jurisdiction to hear the case and directed the lower Court to determine whether restitution was in order.

> "* * * The case must therefore be remanded to that court so that it may exercise the discretion that belongs to it. Should the court decide to issue a restitution order and should there ap-

pear to be conflicting claims and counterclaims between tenants and landlord as to the amounts due, the court has inherent power to bring in all the interested parties and settle the controversies or to retain the case until the matters are otherwise litigated."

Porter v. Warner Holding Co. (1945), 328 U.S. 395, 403.

The holding of *Porter v. Warner Holding Co.* being that restitution MAY be granted, we come to the question, SHOULD restitution be granted?

The subject of restitution has been fully treated by the Supreme Court in *Atlantic Coast Line R. Co. v. Florida* (1934), 295 U.S. 301.

In that case, the Utility had charged and collected rates which were unlawful. It collected on the basis of a Public Utilities' Commission regulation which ordered it to do so, but which was later held void. None of the money for which restitution was sought could have been legally collected by the Utility in the first place had the persons who paid the freight rates objected to their payment or questioned the validity of the regulation under which they were paid. Nevertheless, the Court inquired into all the circumstances and concluded that it was fair that a part of the money so collected be restored, but it was inequitable to order it all to be restored.

"* * * A cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function * * * The claimant to prevail must

show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it. * * * The question no longer is whether the law would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it."

Atlantic Coast Line R. Co. v. Florida (1934), 295 U.S. 301, 309-310.

"Suits for restitution upon the reversal of a judgment have been subjected to the empire of that principle like suits for restitution generally. 'Restitution is not of mere right. It is ex gratia, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it, nor where the process is set aside for a mere slip.' (Gould v. McFall, 118 Pa. 455, 456, 12 A. 336, 4 Am. St. Rep. 606, citing Harger v. Washington County, 12 Pa. 251. There are other decisions to the same effect. Alden v. Lee, 1 Yeates, 207; Green v. Stone, 1 Harr. & J. 405; State ex rel. Hayden v. Horton, 70 Neb. 334, 97 N.W. 434, 99 N.W. 501; Teasdale v. Stoller, 133 Mo. 645, 652, 34 S.W. 873, 54 Am. St. Rep. 703. 'In such cases the simple but comprehensive question is whether the circumstances are such that equitably the defendant should restore to the plaintiff what he has received.' Johnson v. Miller, 31 N.S. 83, 87."

Atlantic Coast Line R. Co. v. Florida (1934), 295 U.S. 301, 309-310.

The case lays down the rules that the burden is upon the party seeking restitution to show that it is inequitable to order him to restore it.

The action of the trial judge in holding, as he did deliberately, that the burden was upon the defendants to show that it was inequitable to compel them to restore, rather than that the burden was upon the United States to show that it was inequitable to allow them to retain the money, is not supportable by any case decided by the Supreme Court and only by a misconstruction of one or two Circuit Court decisions.

In *Woods v. McCord* (1949) (C.A. 9th), 175 F. (2d) 919 this Court held that the trial judge abused this discretion in failing to order restitution under the circumstances. The trial judge in that case apparently believed that he did not have power to order restitution of overpayments made to the defendants more than one year prior to the commencement of the action despite aggravated circumstances showing that defendants knowingly and wantonly overcharged their tenants as a matter of long-sustained business practice, and when their demeanor was suspected failed to cooperate with the housing expediter in any way to permit him to learn the facts.

> "The trial court apparently felt that although the one year period did not apply to actions for restitution, and the doctrine of laches did not for obvious reasons apply to Government agencies in their efforts to enforce Congressional policy, nonetheless (since restitution was primarily for the benefit of the tenants) the doctrine of laches was

apposite, and that since the normal period of laches, as an equitable concept, was co-existent with cognate statutes of limitations, a one year equitable limitation should be applied to actions for restitution. With this we do not agree. It is merely an indirect application of that which cannot be done directly."

Woods v. McCord (1949), (C.A. 9th), 175 F. (2d) 919, 921-922.

"Scrutiny of the numerous unanswered requests by the Office of Price Administration for information, from appellees, the necessity to subpoena appellees' records in order to obtain that information, plus the necessity of the suit in the State court indicated absence of an honest effort to cooperate."

Woods v. McCord (1949) (C.A. 9th), 175 F. (2d) 919, 922.

In the instant case, appellants admit that the judgment of restitution is within the jurisdictional power of the trial Court, and that the order for restitution is valid, provided that plaintiff sustain its burden of proving that equity—all of the circumstances involved in the case—demands such exercise of the Court's discretion. His Honor, Judge Carter, assumed it was mandatory on him to order restitution whether the plaintiff sustained any burden of proof or not, and he so found, we submit, erroneously.

In *Woods v. Davis* (1950) (C.A. 9th), 185 F. (2d) 567, this Court had before it an extraordinary transcript. The trial judge was asked to render a sum-

mary judgment for plaintiff, after all allegations of the complaint were admitted by defendant by his failure to reply. Instead, the trial judge dismissed the suit on the ground that defendant was without means. This Court pointed out, in reversing the ruling, that the trial judge was in error not only because he attempted to make findings of fact without the formality of a trial, but also because lack of means is in and of itself no sufficient reason to deny restitution.

> "* * * It necessarily follows that a claim of inability to refund excess rentals, unlawfully exacted of tenants, may not be considered in the trial or determination of a suit by the Expediter to obtain a restitution order. If the contrary view were to obtain landlords would be encouraged in advance to disregard the law and to dissipate or secrete their illicit profits."
>
> *Woods v. Davis* (1950), (C.A. 9th), 185 F. (2d) 567, 569.

It should be noted that in reversing, this Court did not order the trial Court to enter a judgment for restitution, but rather remanded the cause "for further proceedings not inconsistent with this opinion" (*Woods v. Davis* (1950) (C.A. 9th), 185 F. (2d) 567 at 569).

We respectfully submit that these cases do not manifest any intention on the part of this Court to disregard in rent cases the firmly established rules of restitution and burden of proof and to shift to the defendant the burden to prove to the Court's satisfaction that restitution should not be ordered.

THE DAMAGES ORDERED PAID ARE EXCESSIVE.

Plaintiff's Exhibit A (Tr. 9) sets forth the overcharges on the basis of which the trial Court entered judgment. Thereby it appears that overcharges within one year preceding the filing of this action amounted to $75, and the overcharges preceding this one year period totaled $925; by its Amended Order for Judgment, the trial Court found that $25 of the $925 were legally collected, so that only $900 were illegally colected by defendants prior to the one year period.

The judgment entered herein overlaps. It provides for $225 damages, being three times the $75 improperly collected within one year of the suit's commencement, and $975 restitution to the tenant. Thus the total cost to defendants is $900 restitution reflecting overcharges received prior to August 3, 1949 and four times the overcharges of $75 received between August 3, 1949 and August 3, 1950.

Appellants contend that the Housing and Rent Act can be construed only to permit a maximum judgment of three times the overcharge.

In *Orenstein v. United States* (1951) (C.A. 1st), 191 F. (2d) 184 at 191-192, the Court states:

> "But in §204 of the Housing and Rent Act of 1947, as amended, containing the provision for recovery of damages corresponding to § 205(e) of the Emergency Price Control Act, the United States is entitled as of right to judgment for three times the amount of the overcharges occurring within one year prior to the filing of the complaint, unless the landlord proves that the viola-

tion was neither willful nor negligent. No discretion as to the amount of damages is confided in the court. Therefore, if the United States insists, as it may, upon recovery of a judgment for treble damages in the case of a willful or negligent violator, the court must render such judgment; however, if the court does so, it will no longer be an appropriate exercise of equitable jurisdiction to issue an order for restitution to the tenant under § 206(b) of the Housing and Rent Act. We say this, because an order for restitution and the recovery by the United States of treble damages by way of penalty are both in vindication of the public interest, where the tenant fails to pursue his private remedy; and *there is no indication that Congress ever contemplated that the maximum liability of even a willful violator should be in excess of three times the amount of the overcharges.*" (Emphasis added.)

Orenstein v. United States (1951) (C.A. 1st), 191 F. (2d) 184, 191-192.

CONCLUSION.

Appellants respectfully submit that the trial Court improperly shifted the burden of proof upon defendants in regard to the equitable issue raised by plaintiff's demand for restitution.

As to the overcharges found to have been improperly paid within one year prior to the filing of this suit, the trial Court improperly ordered defendants to pay a total of four times the overcharges instead of the

maximum treble damages or double damages plus restitution.

Dated, Berkeley, California,
December 10, 1951.

Respectfully submitted,
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Attorney for Appellants.